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17 UNITED STATES DISTRICT COURT
18 CENTRAL DISTRICT OF CALIFORNIA

19 JAMIE BEECHUM and MONICA
20 HERVEY on behalf of themselves and
21 all others similarly situated,
22 Plaintiffs,
23 v.

24 NAVIENT SOLUTIONS, INC., SLM
25 PRIVATE CREDIT STUDENT
26 LOAN TRUST 2005-A, THE BANK
27 OF NEW YORK MELLON TRUST
28 COMPANY, N.A., VL FUNDING
LLC and NAVIENT CREDIT
FINANCE CORPORATION,
Defendants.

CASE NO: 2:15-cv-8239-JGB (KKx)

CLASS ACTION

CORRECTED FIRST AMENDED
COMPLAINT FOR DAMAGES
AND EQUITABLE AND
INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

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1 Plaintiff Jamie Beechum brings this action against Defendants Navient
2 Solutions, Inc., SLM Private Credit Student Loan Trust 2005-A and The Bank of
3 New York Mellon Trust Company, N.A. (in its representative capacity), and
4 Plaintiff Monica Hervey brings this action against Defendants Navient Solutions,
5 Inc., VL Funding LLC and Navient Credit Finance Corporation, and both bring
6 suit on behalf of all others similarly situated (the “Class,” as defined further in ¶105,
7 and based on their knowledge, the investigation of counsel and information and
8 belief, allege as follows:

9 I. INTRODUCTION

10 1. This case involves a private company using a national bank as a
11 nominee to make loans to students at for-profit schools with interest rates as high as
12 18.125%, nearly double the rate that non-bank lenders are allowed to charge under
13 the California Constitution and the California Usury Law. Because the law looks to
14 the substance of a transaction, not its form, the loans were and are usurious. Just as
15 a borrower may not use a nominee to obtain a lower interest rate, a lender may not
16 use a nominee to obtain a higher interest rate.

17 2. Defendant Navient Solutions, Inc. (“NSI”) and its predecessors have
18 charged Plaintiffs Beechum and Hervey interest above 18% per annum on their
19 private credit student loans, and has charged them interest over 13% within the past
20 three years. NSI continues to charge Plaintiff Beechum interest above 13%, the
21 lowest rate she has been charged since obtaining her loan over ten years ago.

22 3. These rates are usurious under the California Constitution and the
23 California Usury Law, which prohibit a non-bank lender from charging interest at
24 an annual rate exceeding 10% for loans used primarily for such things as
25 educational expenses.¹

26
27 ¹ All rates of interest referenced throughout this First Amended Complaint
28 are per annum.

1 4. Plaintiffs' loan contracts identified the lender as Stillwater National
2 Bank and Trust Company ("Stillwater"), a national bank located in Stillwater,
3 Oklahoma. Stillwater, however, was a nominee.

4 5. The loans were made by the Student Loan Marketing Association
5 ("SLMA"), or subsidiaries of the SLM Corporation ("SLM Corp"), which were the
6 actual lenders.

7 6. The SLMA and the SLM Corp. subsidiaries originated, underwrote,
8 funded and bore the risk of loss as to the loans under a confidential agreement, the
9 ExportSS® Agreement, between the SLMA and Stillwater. The ExportSS®
10 Agreement provided that Stillwater was required to sell the loans to the SLMA at
11 cost within 90 days of being funded.

12 7. This arrangement enabled the SLMA and the SLM Corp. subsidiaries
13 to make high-interest private credit loans to students such as Plaintiffs Beechum and
14 Hervey attending for-profit schools without the scrutiny of any bank regulatory
15 body, and without the market restraints faced by regulated lenders.

16 8. The SLMA and SLM Corp. subsidiaries made thousands of loans to
17 California borrowers using Stillwater as the nominee lender.

18 9. The loans were and continue to be serviced by an SLMA or an SLM
19 Corp. subsidiary, or a successor entity, which is now Defendant Navient Solutions,
20 Inc. ("NSI").

21 10. NSI and its predecessors collected, and continue to collect, millions of
22 dollars to which they were not, and are not, entitled.

23 11. Because the substance of the transaction establishes that the loans were
24 made by a non-bank lender, and not by a national bank, all interest charged on
25 Plaintiffs' loans at a rate exceeding 10% was and is usurious and unlawful. Plaintiffs,
26 and the Class, are entitled to treble damages for interest paid within one year of
27 bringing suit that was charged at a rate exceeding 10%; the return of all interest
28

1 previously paid that was charged at a rate exceeding 10%; and injunctive relief
2 prohibiting Defendant NSI from charging interest at a rate exceeding 10%.

3 4 **II. PARTIES**

5 12. Plaintiff Jamie Beechum is a California citizen residing in Los Angeles
6 County, California. Plaintiff Beechum applied for and obtained a private credit
7 student loan in May 2004 while a citizen and resident of the State of California by
8 signing a loan application that identified Stillwater National Bank and Trust
9 Company as the lender. The interest rate on her loan has been as high as 18.125%
10 and has never been below 13.125%. Plaintiff Beechum has paid interest on the loan.
11 The loan remains outstanding.

12 13. Plaintiff Monica Hervey is a California citizen residing in Los Angeles
13 County, California. Plaintiff Hervey applied for and obtained private credit student
14 loans in 2003 and 2004 while a citizen and resident of the State of California by
15 signing loan applications that identified Stillwater National Bank and Trust Co. as
16 the lender. The interest rate on her loans have been as high as 18.125%, and she has
17 been charged interest at a rate exceeding 10% within the last three years. Plaintiff
18 Hervey has paid interest on the loans that was charged at a rate above 10%. The
19 loans remain outstanding.

20 14. **Defendant Navient Solutions, Inc.** (“Navient Solutions” or “NSI”) is a
21 Delaware Corporation, and is a wholly owned subsidiary of Navient Corporation.
22 NSI is the successor entity to Sallie Mae, Inc. (“SMI”), which serviced Plaintiffs’
23 private credit student loans prior to NSI. The entity that serviced Plaintiffs’ loan
24 prior to SMI, Sallie Mae Servicing, LLP, was a subsidiary of the SLMA, and was
25 merged into Sallie Mae, Inc. Thus, from its inception to the present, NSI or one of
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1 its predecessors has serviced Plaintiffs' private credit student loans for which
2 Stillwater was identified as the lender.²

3 15. NSI charged Plaintiffs Beechum and Hervey and Class members
4 interest at a rate exceeding 10%, and received and continues to receive interest from
5 Plaintiff Beechum and Class members that was charged at a rate exceeding 10%.

6 16. **Defendant SLM Private Credit Student Loan Trust 2005-A ("2005-A**
7 **Trust")** is a Delaware statutory trust established for the purpose of financing the
8 purchase of private credit student loans. The 2005-A Trust is the current assigned
9 counterparty to and nominal owner of Plaintiff Beechum's private credit student
10 loan.

11 17. The 2005-A Trust received and continues to receive interest from NSI
12 that was charged Plaintiff Beechum and Class members at a rate exceeding 10%.

13 18. **The Bank of New York Mellon Trust Company, N.A.**, operates as a
14 nationally chartered trust company and is the trustee for the 2005-A Trust.

15 19. As the trustee, and pursuant to a trust agreement, The Bank of New
16 York Mellon Trust Company, N.A. carries out the business of the 2005-A Trust,
17 and it may sue or be sued on behalf of the 2005-A Trust. It is sued here in its
18 representative capacity.

19 20. **Defendant VL Funding LLC ("VL Funding")** is a limited liability
20 company that operates as a subsidiary of Navient Corporation, established for the
21 purpose of purchasing loans from subsidiaries or affiliates of Navient Corporation
22 and its predecessor SLM Corporation. VL Funding is the current assigned
23 counterparty to and nominal owner of one of Plaintiff Hervey's private credit
24 student loans.

25
26
27 ² All subsequent references in this First Amended Complaint to "NSI"
28 include its predecessors in interest, SMI and Sallie Mae Servicing, LLP.

1 21. VL Funding received and continues to receive interest from NSI that
2 was charged to Plaintiff Hervey and Class members at a rate exceeding 10%.

3 22. **Defendant Navient Credit Finance Corporation (“NCFC”)** is a
4 Delaware corporation and wholly owned subsidiary of Navient Corporation. NCFC
5 is the successor entity to the SLM Education Credit Finance Corporation, which
6 was a wholly owned subsidiary of the SLM Corp. NCFC is the current assigned
7 counterparty to two of Plaintiff’s Hervey’s private credit student loans.

8 23. NCFC received and continues to receive interest from NSI that was
9 charged Plaintiff Hervey and Class members at a rate exceeding 10%.

10
11 **III. JURISDICTION AND VENUE**

12 24. Jurisdiction is proper under 28 U.S.C. § 1332 as there is diversity of
13 citizenship between the parties. Plaintiffs are citizens of California. Defendant
14 Navient Solutions, Inc. is incorporated in the State of Delaware and has its primary
15 offices in Newark, Delaware.

16 25. The 2005-A Trust was established in Delaware.

17 26. The Bank of New York Mellon Trust Company, N.A., is incorporated
18 in California.

19 27. VL Funding is incorporated in Delaware.

20 28. Upon information and belief, the amount in controversy exceeds
21 \$5,000,000 for Plaintiffs and the Class collectively, exclusive of interest and costs, by
22 virtue of the revenue and profits reaped by Defendants from their transactions with
23 Plaintiffs and the Class as a direct and proximate result of their wrongful conduct,
24 and by virtue of the injunctive and equitable relief sought.

25 29. The total number of Class members is likely to be in the thousands.

26 30. Venue is proper within this judicial district under 28 U.S.C. § 1391(b)
27 and (c). Defendant NSI transacts business within this district. A substantial portion
28

1 of the underlying transactions and events complained of occurred in this district,
2 and affected persons who reside in this district.

3 4 **IV. FACTUAL ALLEGATIONS**

5 **A. The California Constitution and the California Usury Law Prohibit** 6 **Non-Bank Lenders From Charging Interest At a Rate Exceeding 10%**

7 31. The California Constitution, art. XV, § 1, sets the maximum rate of
8 interest at 10% for loans made by a non-bank lender of money used primarily for
9 personal, family, or household purposes, such as loans used to pay for educational
10 expenses. Only banks licensed under the laws of the United States of America,
11 California, or another state are exempt from this limitation. See Cal. Const., art.
12 XV, § 1 (providing that loans “made by ... any bank created and operating under
13 and pursuant to any laws of [California] or of the United States of America” are not
14 subject to the usury limit); Calif. Fin. Code § 1675 (exempting “[a]ny foreign (other
15 state) state bank” from the interest rate restrictions of Cal. Const., art. XV, § 1.

16 32. California’s statutory proscription against usury is set forth in what is
17 collectively referred to as the “Usury Law,” an un-codified Initiative Measure
18 adopted nearly 100 years ago which is set forth in three sections. See Cal. Civ. Code
19 § 1916-1 through 1916-3. In accordance with the California Constitution, the
20 California Usury Law limits the interest rate that non-bank lenders may charge on
21 loans of money used primarily for personal, family, or household purposes to 10%.

22 **B. SLMA Privatization**

23 33. The SLMA was created pursuant to federal statute and chartered by
24 the federal government as a government sponsored enterprise (“GSE”). The SLMA
25 was prohibited by statute from originating loans.

26 34. In or about 1994, Congress required the SLMA to transition to a
27 wholly private company no later than September 30, 2008.

1 35. As part of the transition, various segments and subsidiaries of the
2 SLMA were acquired by the SLM Corp., a parent holding company that continued
3 the SLMA's operations during the transition period and after the SLMA's
4 dissolution.

5 36. The SLMA, and its parent the SLM Corp., wanted to change its
6 business to include loan origination and lending. Beginning no later than 2002, the
7 SLM Corp. sought to acquire or establish a bank to enable it to operate as a lender,
8 but it was not permitted to do so by the United States Department of the Treasury
9 until after the SLMA's dissolution.

10 37. The SLMA and SLM Corp., and its wholly-owned subsidiaries, knew
11 that if they made student loans directly, they could not avail themselves of the
12 exemptions provided to bank lenders, and would be subject to the usury limits
13 imposed by California state law. Rather than comply with California law, the
14 SLMA, and the SLM Corp. and its wholly-owned subsidiaries, circumvented the law
15 by entering into forward purchase agreements with so-called lender partners, to
16 make it appear that the lender was a national bank.

17 38. One such forward purchase agreement was the ExportSS® Agreement
18 between the SLMA and Stillwater National Bank and Trust Company (the "SLMA-
19 Stillwater Agreement"), located in Stillwater, Oklahoma. See Exhibit (Ex.) A.

20 **C. The Substance of the SLMA-Stillwater Agreement**

21 39. The SLMA-Stillwater Agreement became effective July 1, 2002. Ex. A
22 at 1.

23 40. The terms of the SLMA-Stillwater Agreement and its implementation
24 evince that Stillwater was a mere nominee and that the SLMA made the loans and
25 was the actual lender.

26 41. Under the SLMA-Stillwater Agreement, the SLMA would originate,
27 underwrite, market and fund loans for which Stillwater would be identified as the
28 lender, and which the SLMA would then purchase from Stillwater.

1 42. The SLMA-Stillwater Agreement included a commitment by the
2 SLMA to purchase a specified dollar volume of loans within a set period of time.

3 43. The loans encompassed by the SLMA-Stillwater Agreement included
4 certain private credit student loans, referred to as “Eligible Private Loans,” as
5 defined in Part II of Attachment H to the Agreement, and subsequent amendments.

6 44. The SLMA committed to funding and purchasing at least
7 \$120,000,000.00 in Eligible Private Loans during the initial commitment period,
8 July 1, 2002 to June 30, 2005, an amount that was subsequently substantially
9 increased. Ex. A at 36-37.

10 45. Under the SLMA-Stillwater Agreement, the SLMA would originate
11 “Private Loans,”³ as the exclusive agent for Stillwater, and Stillwater agreed not to
12 create or otherwise participate in any program that competed with the SLMA’s
13 Signature Education Loan program. Ex. A at 3, 23-24.

14 46. The Private Loans were funded from a bank account maintained by the
15 SLMA. Ex. A at 5. Stillwater was required to provide the SLMA with a power of
16 attorney which, among other things, authorized the SLMA to debit a Stillwater
17 account in order to fund all loan disbursements and other payments. Ex. A at 5, 57.
18 The SLMA disbursed the loan funds and sent a disbursement roster to the schools.
19 Ex. A at 6.

20 47. Stillwater sold and the SLMA purchased 100% of the Eligible Private
21 Loans within 90 days of disbursement.

22 48. The SLMA-Stillwater Agreement specified the loans would be sold to
23 the SLMA for principal, plus accrued interest, and less the amount paid or payable
24

25 ³ The terms “Private Loan,” or “Private Loans,” as used throughout this
26 Complaint, refer to and include loans made under the Agreement between the
27 SLMA (and its successors) and Stillwater that are not federal loans, nor guaranteed
28 or insured by any government entity, and include Signature Loans, CEC Signature
Loans (also referred to as CEC Private Loans), and CEC Recourse Loans.

1 to insure the loans. Ex. A at 25. In other words, the SLMA purchased the loans at
2 cost. Stillwater received no premium from selling or transferring the loans, as would
3 be expected if Stillwater had been the original lender or had actually made the
4 loans.

5 49. In effect, the SLMA paid Stillwater for the use of its charter by
6 permitting Stillwater to receive interest on the funded loans for 90 days.

7 50. Stillwater did not have any risk of loss with respect to the loans
8 because, *inter alia*, the SLMA provided the funds for the loans and agreed in
9 advance to purchase the loans from Stillwater. See Ex. A at 19, 36-37, 65. In fact,
10 the SLMA agreed to and did purchase loans of borrowers who died or became
11 disabled while still nominally owned by Stillwater.

12 51. The SLMA controlled all aspects of marketing loans to student
13 borrowers, and required Stillwater to “print, package and distribute... Application
14 Materials in forms acceptable to [the SLMA],” based on “a design template for such
15 materials” provided by the SLMA. Stillwater was not allowed to alter the content or
16 description of Application Materials without the SLMA’s express written consent.
17 Ex. A at 13. Stillwater’s role was to add its “name, state, logo and OE number,” to
18 the applications, which made it appear as if Stillwater was the lender.

19 52. Among other things, the SLMA: set the terms of the Private Loans;
20 controlled the schools at which the loans could be made; determined which students
21 would be approved for loans and for what amounts; and determined the interest
22 rate on a borrower’s loan based on proprietary credit criteria established by the
23 SLMA. Ex A at 3-4, 64-66, 70-73, 79-82.

24 53. When the SLMA was dissolved in 2004 and merged into the SLM
25 Corp., the SLMA-Stillwater Agreement was amended, and the SLMA’s role was
26 assigned to two wholly-owned subsidiaries of the SLM Corp., the SLM Education
27 Credit and Finance Corporation and Sallie Mae, Inc.
28

D. The SLMA Establishes a Securitization Program to Raise Funds to Make Loans

54. The SLMA, and its parent and successor entity SLM Corp., obtained the funds to make loans through a securitization program, which raised funds by selling interest-bearing notes to investors.

55. At a meeting on July 25, 2002, the SLM Corp.'s Board of Directors authorized the SLM Corp. or its subsidiaries to establish one or more subsidiary corporations or limited liability corporations by which to securitize private loans.

56. Thereafter, the SLM Corp. and its subsidiaries established one or more "SLM Private Credit Student Loan Trust" each year ("SLM Private Credit Trust" or "SLM Private Credit Trusts"). The SLM Private Credit Trusts issued and sold notes to investors, with each Trust raising more than \$1 billion. The funds were used to make private loans through the SLMA's forward purchase commitments.

57. The funding and transfer of the loans was accomplished through a series of transactions involving special purpose entities, which resulted in the loans being assigned to various subsidiaries or affiliates of the SLM Corp. and its successor, Navient Corporation, including SLM Private Credit Trusts, VL Funding and NCFC.

58. The SLM Private Credit Trusts, VL Funding and NCFC do not take physical possession of the promissory notes. The promissory notes remain in the possession and custody of NSI.

E. Private Loans Made Under the SLMA-Stillwater Agreement Are Subject to and Not Exempt From California's Usury Law

59. The contracts used to make Private Loans under the SLMA-Stillwater Agreement consisted of a one page application and a corresponding promissory note.⁴

60. All of the applications identified Stillwater National Bank, Stillwater, Oklahoma as the "Lender," and all the promissory notes stated that the loan was subject to the laws of the state where the lender was located.

61. Notwithstanding the form of the transaction, the substance of the transaction was that the SLMA was the actual lender that made Plaintiffs' loans, not Stillwater. Plaintiffs' loans are thus subject to the California usury limit of 10% because under California law the substance, not the form of a transaction determines whether it is subject to the Usury Law.

F. The Loans Are Not Subject to National Bank Act Preemption

62. The National Bank Act ("NBA"), 12 U.S.C. § 85 provides that loans made by a national bank are subject to the interest rates of the home state of the national bank, regardless of where the loans were made, and preempts other states' usury laws.

63. This preemption provision does not apply to Plaintiffs' and Class members Private Loans because application of California state law would not significantly interfere with Stillwater's ability to exercise its power under the NBA.

64. Even if the preemption of the NBA could be assigned, the Private Loans of Plaintiffs and the Class would not be subject to the preemption provision of the NBA because the loans were not made by Stillwater. Instead, under the terms

⁴ An exemplary application page and corresponding promissory note are attached as Ex. B.

1 of the SLMA-Stillwater Agreement, and as implemented, the loans were made by
2 the SLMA, and later by SLM ECFC and other SLM Corp. subsidiaries.

3 **G. The Department of the Treasury's Draft Report Determined the**
4 **SLMA Originated Student Loans**

5 65. In 2011, the Office of Sallie Mae Oversight ("OSMO") of the U.S.
6 Department of the Treasury published on its website a draft report dated March
7 2006 and entitled, "Lessons Learned from the Privatization of Sallie Mae" ("OSMO
8 Draft Report"). The OSMO Draft Report examined in detail the true role of the
9 SLMA in making loans.

10 66. The Draft Report explained that the SLMA had viewed its "wind down
11 as an opportunity to reinvent its business ... to a vertically integrated company that
12 originated loans for itself (and thereby controlled its acquisition costs)..." Ex. C at p.
13 5 (footnote omitted). However, because the SLMA was not a bank, it used so-called
14 lender partner banks, such as Stillwater, to make it appear as if the loans were made
15 by a national bank. Notwithstanding the form of these transactions, the Draft
16 Report stated:

17 Based on its examination of SLMA's relationship with its funding
18 bank partners, OSMO concluded that SLMA, in substance, was
19 originating certain private loans. The funding banks did not take
20 long-term possession of the notes signed by the student borrowers,
21 nor did they assume the credit risk associated with the notes. The
22 GSE [SLMA] unconditionally purchased the notes, generally within
23 a month, even in case of the borrower's death. Further, the
24 economic substance of the payments by SLMA to the funding banks
25 reflected loan origination via a "storefront" rather than second
26 market activity.

27 Ex. C at 15 (footnote omitted).
28

1 67. The OSMO Draft Report further explained, “[i]n a true secondary
2 market, a bank would sell its asset into the secondary market (*i.e.*, to Sallie Mae) at
3 its fair value. However, in practice that was not how these loans ‘sold’ to Sallie Mae
4 were priced.” Ex. C at 15, n. 199. Instead, “[t]he loans were sold to Sallie Mae by its
5 ‘storefront banks’ at cost plus interest during the holding period rather than at fair
6 value. This was, in effect, origination by SLMA.” *Id.*

7 68. As part of its new origination business, the SLMA and its affiliated
8 entities expanded into so-called “trade school loans” and other private loans, raising
9 billions of dollars through securitization to make loans to students attending for-
10 profit schools. By 2004, when the SLMA was dissolved and merged into the SLM
11 Corp., the SLM Corp. was managing \$12 billion in private loans. Ex. C at 10-11.

12 **H. NSI Charges and Receives Usurious Interest**

13 69. The Private Loans of Plaintiffs and the Class accrue interest from the
14 date funds are disbursed until the loans are re-paid in full. Interest is charged at a
15 “Variable Rate,” which is determined by adding a fixed percentage set at the time
16 the funds are disbursed (the “Margin”), to the prime rate.

17 70. The Variable Rate is defined as:
18 the annual rate equal to the sum of the highest Prime Rate published in The
19 Wall Street Journal Credit Markets’ section, “Money Rates” table on the
20 fifteenth day of the last month of the quarter prior to [the] loan’s
21 disbursement or Change Date (the “Current Index”) plus or minus the
22 percentage as identified on my Disclosure Statement, which is hereby
23 incorporated into this Note, per annum (the “Margin”) and rounded to the
24 nearest one-eighth (0.125) of one percent. (For example, the Variable Rate
25 for each quarter beginning January 1st will be determined by the applicable
26 Prime Rate published on the preceding December 15th.) The Margin is
27 based on my school, credit history and co-borrower-s credit history. Once
28

1 set, the Margin does not change. The actual interest rate during the quarter
2 in which my loan is disbursed will be on my Disclosure Statement.

3 Ex. B at 2, Sec. C.2.

4 71. Thus, in any given quarter, NSI charges interest on the Private Loans
5 of Plaintiffs and the Class at a rate equal to the (variable) Prime Rate plus the (fixed)
6 Margin.

7 72. Borrowers were not told the Margin (or the resulting interest rate) when
8 they applied for a loan, or even when they were notified their application had been
9 approved. Borrowers were first told the interest rate they were being charged when
10 they were notified the loan funds had been or were being disbursed.

11 73. Since Plaintiffs obtained their loans, the Prime Rate has ranged
12 between 3.25% and 8.25%. See historical data for the Prime Rate, available at
13 <http://www.federalreserve.gov/releases/h15/data.htm>. The Prime Rate published in
14 the Wall Street Journal also ranged between 3.25% and 8.25% during the Class
15 Period.

16 74. The fixed Margin for Plaintiffs' loans is 9.85%.

17 75. NSI charged interest exceeding 10% on Plaintiffs' loans. In fact, the
18 interest on their loans has been as high as 18.125%, and the interest on Plaintiff
19 Beechum's loans has never been below 13.125%.

20 76. NSI has charged, or charges, interest at a rate exceeding 10% to
21 numerous student borrowers who have Private Loans.

22 77. NSI received millions of dollars of interest on Private Loans of the
23 Class that was charged at a rate exceeding 10%.

24 **I. NSI Benefits From the Usurious Interest**

25 78. NSI has an agreement with each of the SLM Private Credit Trusts and
26 other entities to which the Private Loans are transferred, including VL Funding and
27 NCFC to service the Private Loans. NSI pays itself a monthly fee for servicing the
28

1 loans based on the outstanding principal balance of the loans. The monthly fee is
2 1/12 (not to exceed 0.007%) of the sum of the outstanding principal of the loans.

3 79. NSI benefits from the usurious interest charged and paid by Plaintiffs
4 and Class members because higher interest results in higher monthly payments
5 which, in turn, results in borrowers being unable to pay down their loans as quickly.

6 80. NSI also benefits from the usurious rate of interest because unpaid
7 interest is “capitalized,” *i.e.*, added to the principal, and thereby increases the fees
8 paid to NSI.

9 **J. NSI Exercises Control Over and Has a Beneficial Interest in the**
10 **Plaintiffs’ and Class Members’ Private Loans**

11 81. NSI also acts as administrator of the SLM Private Credit Trusts,
12 including the 2005-A Trust, and other entities to which the Private Loans are
13 transferred, including VL Funding and NCFC.

14 82. NSI is authorized under certain circumstances to transfer loans out of
15 the SLM Private Credit Trusts and other entities and substitute other loans in their
16 place.

17 83. NSI is able to and does exercise control over the rate of interest. For
18 example, NSI offers a temporary rate reduction program to certain borrowers
19 reducing the interest rate for a limited period of time.

20 84. NSI, or a related entity, is also the beneficiary of the insurance on
21 Plaintiffs’ and Class members’ Private Loans.

22 85. Borrowers, including Plaintiffs and Class members, are not told or
23 informed of the identity of the SLM Private Credit Trusts or other entities to which
24 their Private Loans are transferred or nominally owned. In fact, borrowers have no
25 means or ability to learn the identity of the SLM Private Credit Trusts or other
26 entities to which their Private Loans are transferred or nominally owned. Plaintiffs
27 in this case requested NSI to tell them the Trust or other entity to which their loans
28

1 had been transferred and NSI refused to do so. Plaintiffs were provided that
2 information only after filing suit.

3 **K. The 2005-A Trust, VL Funding and NCFC Also Receive Usurious**
4 **Interest**

5 86. After collecting and receiving payments from Plaintiffs and Class
6 members, NSI pays the interest and principal payments, made by the Plaintiffs and
7 Class members, to the counterparties and nominal owners of the Private Loans,
8 including Defendant 2005-A Trust, Defendant VL Funding and Defendant NCFC.
9

10 **V. REPRESENTATIVE PLAINTIFFS AND THE CLASS**

11 **A. Plaintiffs' Loans**

12 87. **Plaintiff Jamie Beechum** applied for and obtained a Private Loan in
13 2004 to pay for the cost of her education at Brooks Institute of Photography.

14 88. The margin is 9.85% and with the Prime Rate of 3.5%, the current
15 interest rate is 13.375% (rounded to the nearest one-eighth percent, see Ex. B, p.4).

16 89. Plaintiff Beechum's loan was assigned to SLM ECFC shortly after
17 disbursement. Thereafter, SLM ECFC either directly or through intermediaries
18 transferred the loan to Defendant 2005-A Trust.

19 90. Defendant NSI has serviced Plaintiff Beechum's Private Loan since its
20 inception.

21 91. **Plaintiff Monica Hervey** applied for and obtained Private Loans in
22 2003 and in 2004 to pay for the cost of her education at Brooks Institute of
23 Photography.

24 92. Plaintiff Hervey's outstanding loans are currently part of NSI's
25 temporary rate reduction program. Her enrollment in the program expires in
26 October 2016, at which time the interest rate will again be above 10% - unless the
27 rate reduction program continues and NSI accepts her into the program for another
28 year.

1 93. Plaintiff Hervey's loans were assigned to the SLMA and SLM ECFC
2 shortly after disbursement. Thereafter, the SLMA and SLM ECFC either directly or
3 through intermediaries transferred the loans to Defendant NCFC.

4 94. Defendant NSI has serviced Plaintiff Hervey's Private Loans since their
5 inception.

6 **B. The Private Loans Are the Same in All Material Respects.**

7 95. Like all other borrowers who were provided Private Loans as to which
8 Stillwater was identified as the lender, Plaintiffs received a standard form
9 application page and promissory note. Ex. B. This promissory note could not be
10 modified or otherwise negotiated by Plaintiffs or other borrowers since it was
11 offered solely on a "take it or leave it" basis, and included statements such as "THIS
12 IS A NON-NEGOTIABLE CONSUMER NOTE." See *e.g.* Ex. B at 4.

13 96. Plaintiffs' promissory notes, like the promissory notes for all other
14 Private Loans, included an assignment clause providing, "If this Note is assigned,
15 the Assignee will become the owner of this Note and will have all your rights to
16 enforce this Note against me [the borrower]" and "I may not assign this Note or any
17 of its benefits or obligations. You may assign this Note at any time." See Ex. B at 3,
18 Sec. L, 10.

19 97. Plaintiffs' promissory notes, like the promissory notes for all other
20 Private Loans, included a promise to pay providing that "I will make consecutive
21 monthly payments during the Repayment Period in the amounts and on or before
22 the payment due dates shown on my statements until I have paid all of the principal
23 and interest and any other charges I may owe on this Note." See Ex. B at 2, Sec. D,
24 3.

25 98. Plaintiffs' promissory notes, like all other promissory notes for Private
26 Loans, provided that the interest would be determined at a variable rate. Ex. B at 2,
27 Sec. C, 2.

1 99. Plaintiffs' promissory notes, like the promissory notes for all other
2 Private Loans, provided that the interest rate would be determined on a quarterly
3 basis. Ex. B at 2, Sec. C, 2.

4 100. Plaintiffs' promissory notes, like the promissory notes for all other
5 Private Loans, provided that accrued interest that was not paid would be
6 capitalized, *i.e.*, added to the loan principal, and interest would then be charged on
7 the increased principal. Ex. B at 2.

8 101. Plaintiffs paid interest that had been charged at a rate of more than 10%
9 on multiple occasions.

10 102. On information and belief, at least one occasion each of the Plaintiffs
11 did not pay accrued interest that had been charged at a rate exceeding 10% , and
12 such interest was capitalized (*i.e.*, added to the outstanding principal of the loan).
13 Thereafter, NSI charged Plaintiffs interest on the interest that had been capitalized.

14 103. Plaintiffs and Class members did not consent to pay usurious interest,
15 nor could they have consented to do so, because when they made payments they
16 were unaware they were being charged interest at a usurious rate.

17 **VI. CLASS ACTION ALLEGATIONS**

18 104. This action asserts claims pursuant to Federal Rules of Civil Procedure
19 23(a), and 23(b).

20 105. Plaintiffs bring claims on behalf of themselves and a Class defined as:
21 All persons who obtained a Signature Loan, a CEC Signature Loan, or a
22 CEC Recourse Loan with a loan application that identified Stillwater
23 National Bank as the lender and listed California as the residence of the
24 borrower, and who were charged interest at an annual rate of more than
25 10% for any quarterly period, and whose loan is outstanding or was paid
26 off within four years of the filing of this action.

1 106. The Class is subject to the following exclusions:

2 a. Officers, directors, managerial employees of NSI and its parent and the
3 parent's subsidiaries and their immediate families, and any of the judges of the
4 court before which this case is pending and their immediate families;

5 b. Officers, directors, managerial employees of Stillwater and its parent
6 and the parent's subsidiaries and their immediate families;

7 c. All Signature Loans, CEC Signature Loans and CEC Recourse Loans
8 that were made with a promissory note that includes an arbitration clause or class
9 action waiver.

10 **A. The Class**

11 107. There are thousands of members in the Class who are geographically
12 dispersed throughout California. Therefore, individual joinder of all members of
13 the Class would be impracticable.

14 108. Common questions of law or fact exist as to all members of the Class.
15 These questions predominate over the questions affecting only individual Class
16 members. For the Class, these common legal or factual questions include, but are
17 not limited to:

18 a. Whether under California law, the substance of the transaction was that
19 the actual lender who made the loans under the SLMA-Stillwater Agreement was
20 the SLMA and its successors;

21 b. Whether the loans are subject to the California usury limit of 10% ;

22 c. Whether NSI charged interest on Private Loans at rates exceeding 10% ;

23 d. Whether under the National Bank Act, the actual lender who made the
24 loans under the SLMA-Stillwater Agreement was the SLMA and its successors;

25 e. Whether the loans are subject to the interest preemption provision of
26 the National Bank Act;

27 f. Whether NSI's conduct violated California's Unfair Competition Law,
28 California Business and Professions Code §§ 17200, *et seq.*;

- 1 g. Whether NSI is liable for violations of the California Usury Law;
- 2 h. Whether NSI is liable for conversion;
- 3 i. The appropriate measure of damages; and
- 4 j. The appropriate scope of injunctive relief.

5 109. Plaintiffs' claims are typical of the claims of the Class, in that Plaintiffs
6 were charged and paid interest at a rate exceeding 10% on their Private Loans, and
7 their loans were made in California. Plaintiffs, therefore, are not materially different
8 in relevant respects from other Class members, and the relief sought is common to
9 the Class.

10 110. Plaintiffs are adequate representatives of the Class because their
11 interests do not conflict with the interests of the other Class members, and they
12 have retained competent counsel experienced in conducting complex lending and
13 class action litigation. Plaintiffs and their counsel will adequately protect the
14 interests of the Class.

15 111. A class action is superior to other available means for the fair and
16 efficient adjudication of this dispute. The damages suffered by individual Class
17 member likely will be small by comparison to the burden and expense of the
18 complex litigation necessitated by Defendants' wrongful conduct. Thus, it would be
19 virtually impossible for Class members to obtain redress on an individual basis.
20 Additionally, class-wide litigation is preferable because individualized actions could
21 lead to inconsistent or contradictory judgments.

22 112. A class action also presents far fewer management difficulties, and
23 provides the benefits of single adjudication, including economies of scale, and
24 comprehensive supervision by a single court. In the alternative, the Class may be
25 certified because Defendants have acted or refused to act on grounds generally
26 applicable to the members of the Class, thereby making appropriate preliminary
27 and final equitable relief with respect to the Class.

113. All records concerning each of the Private Loans entered into by members of the Class are in the possession or control of NSI and available through discovery.

VII. CLAIMS FOR RELIEF

A. First Claim for Relief – “Unlawful” Business Practices in Violation of The Unfair Competition Law, Bus. & Prof. Code §§ 17200, *Et Seq.*

114. Plaintiffs incorporate paragraphs 1-113 as if fully stated here.

115. This claim is brought on behalf of Plaintiffs and the Class against all Defendants.

116. The Unfair Competition Law (“UCL”), California Business and Professions Code §§ 17200, *et seq.*, defines unfair business competition to include any “unlawful, unfair or fraudulent” act or practice.

117. A business act or practice is “unlawful” if it violates any established state or federal law.

118. Article XV of the California Constitution sets a maximum legal rate of 10% for interest charged on loans for educational expenses such as the Private Loans. In pertinent part, it states:

Section 1. The rate of interest upon the loan or forbearance of any money, goods, or things in action, or on accounts after demand, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest:

(1) For any loan or forbearance of any money, goods, or things in action, if the money, goods, or things in action are for use primarily for personal, family, or household purposes, at a rate not exceeding 10 percent per annum....

1 119. The Private Loans are loans of money primarily for personal, family, or
2 household purposes subject to Cal. Const., art. XV, § 1(1).

3 120. The Private Loans are loans of money expressed “in writing” within the
4 meaning of the Usury Law. Cal. Civ. Code § 1916-1.

5 121. The 10% interest rate limit set forth in Cal. Const., art. XV, § 1(1) and
6 the Usury Law apply to the Private Loans, and such loans are not subject to any of
7 the exemptions from the Usury Law.

8 122. The loans were not made by a national bank within the meaning of the
9 National Bank Act, 12 U.S.C. §§ 85 and 86.

10 123. NSI has charged interest on the Private Loans at a rate exceeding 10 %
11 and thus exceeding the legal limit.

12 124. The interest charged at a usurious rate that was not paid was
13 capitalized (*i.e.*, added to the outstanding principal).

14 125. Defendant NSI has violated and continues to violate, the “unlawful”
15 prong of the UCL by charging borrowers interest in violation of California’s
16 Constitution, art. XV, § 1(1), and the Usury Law. By committing the acts and
17 practices alleged above, Defendant has engaged, and continue to be engaged, in
18 unlawful business practices within the meaning of California Business and
19 Professions Code §§ 17200, *et seq.*

20 126. Through its unlawful acts and practices Defendant NSI has obtained,
21 and continues to unfairly obtain, money from Plaintiffs and the Class. As such,
22 Plaintiffs requests on behalf of themselves and the Class the relief set forth in the
23 Prayer, including that this Court enjoin Defendant from continuing to violate the
24 Unfair Competition Law as discussed herein. Otherwise, the Class may be
25 irreparably harmed and/or denied an effective and complete remedy.
26
27
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1 **B. Second Claim for Relief – “Unfair” Business Practice in Violation of**
2 **the Unfair Competition Law, Bus. & Prof. Code §§ 17200, *Et Seq.***

3 127. Plaintiffs incorporate paragraphs 1-113 as if fully stated here.

4 128. This claim is brought on behalf of Plaintiffs and the Class against all
5 Defendants.

6 129. A business act or practice is “unfair” under the UCL if the reasons,
7 justifications and motives of the alleged wrongdoer are outweighed by the gravity of
8 the harm to the alleged victims.

9 130. Defendant NSI has and continues to violate the “unfair” prong of the
10 UCL through its assessment of interest at a rate exceeding 10% on the Private
11 Loans.

12 131. Defendant NSI’s assessment of interest at rates exceeding 10% violates
13 the “unfair” prong of the UCL because it is not entitled to charge such interest, and
14 such interest is excessive and not justified by any business need, and creates an
15 onerous burden on Plaintiffs and the Class.

16 132. The gravity of the harm to Plaintiffs and the Class resulting from such
17 unfair acts and practices outweighs any conceivable reasons, justifications and/or
18 motives for Defendant’s conduct. By committing the acts and practices described
19 above, Defendant has engaged, and continues to be engaged, in unfair business
20 practices within the meaning of California Business and Professions Code §§ 17200,
21 *et seq.*

22 133. Through unfair acts and practices Defendant NSI has obtained, and
23 continues to obtain, money from Plaintiffs and the Class. As such, Plaintiffs request
24 on behalf of themselves and the Class the relief set forth in the Prayer, including
25 that the Court enjoin Defendant NSI from continuing to violate the UCL.
26 Otherwise, the Class may be irreparably harmed and/or denied an effective and
27 complete remedy.
28

1 **C. Third Claim for Relief – Usury in Violation of Article XV, Section 1,**
2 **of the California Constitution**

3 134. Plaintiffs incorporate paragraphs 1-113 as if fully stated here.

4 135. This claim is brought on behalf of Plaintiffs and the Class against all
5 Defendants.

6 136. Under the California Constitution, the maximum rate of interest for
7 any loan, if the money, goods, or things in action are for use primarily for personal,
8 family, or household purposes, is 10 %. Cal. Const., art. XV, § 1(1).

9 137. The Private Loans are “loans” for “money” for use “primarily for
10 personal, family, or household purposes,” within the meaning of the California
11 Constitution, art. XV, § 1(1).

12 138. The Private Loans are subject to the California Usury Law and are not
13 excluded or otherwise exempt from the constitutional proscription on usury.

14 139. Defendant NSI charged Plaintiffs and all members of the Class interest
15 exceeding the lawful statutory maximum rate of 10%.

16 140. The Private Loans and interest thereon are absolutely repayable.

17 141. Through usurious charges, Defendant NSI has received, and continues
18 to receive, money from Plaintiffs and the Class in violation of the California
19 Constitution. As such, Plaintiffs request on behalf of themselves and the Class the
20 relief set forth in the Prayer, including that this Court enter an order refunding all
21 interest paid that was charged at a usurious rate, or directing it to be applied to
22 principal, cancelling interest that was charged at a rate exceeding 10% that remains
23 outstanding, or that was capitalized, as well as interest that was charged on the
24 capitalized usurious interest, and limiting any future interest to not more than 10%.
25 Plaintiffs also request that this Court award any other relief that is just and proper.
26
27
28

1 **D. Fourth Claim for Relief – Violation of the Usury Law**

2 142. Plaintiffs incorporate paragraphs 1-113 as if fully stated here.

3 143. This claim is brought on behalf of Plaintiffs and the Class against all
4 Defendants.

5 144. California’s statutory proscription against usury is set forth in the
6 Usury Law, an un-codified Initiative Measure adopted nearly 100 years ago. See
7 Cal. Civ. Code § 1916-1 through § 1916-3.

8 145. The Usury Law provides in part:

9 “The rate of interest upon the loan or forbearance of any money,
10 goods or things in action or on accounts after demand or judgments
11 rendered in any court of this state, shall be seven dollars upon the one
12 hundred dollars for one year and at that rate for a greater or less sum or for
13 a longer or a shorter time; but it shall be competent for parties to contract
14 for the payment and receipt of a rate of interest not exceeding twelve dollars
15 on the one hundred dollars for one year and not exceeding that rate for a
16 greater or less sum or for a longer or shorter time, in which case such rate
17 exceeding seven dollars on one hundred dollars shall be clearly expressed in
18 writing.” Cal. Civ. Code § 1916-1.

19 146. As recognized in *Penziner v. West American Finance Co.*, 10 Cal. 2d
20 160, 174, 74 P.2d 252 (Cal. 1937), the 12% interest rate established by the Usury Law
21 for contracts in writing was amended to 10% by adoption of the usury provisions of
22 the California Constitution.

23 147. Private Loans are “loans” for “money” expressed “in writing” within
24 the meaning of the Usury Law. The loans are not excluded or otherwise exempt
25 from the Usury Law.

26 148. Defendant NSI charged Plaintiffs and Class members interest
27 exceeding 10%.

1 149. The counterparty to the contract willfully intended to enter these
2 transactions and to charge and receive interest charged at a rate exceeding 10%.

3 150. Through usurious charges, Defendant has received, and continues to
4 receive, money from Plaintiffs and the Class in violation of the Usury Law, as
5 amended. As such, Plaintiffs request on behalf of themselves and the Class the relief
6 set forth in the Prayer, including an award of three times the interest paid on the
7 Private Loans as provided by the Usury Law, and an order canceling all future
8 interest on the Private Loans exceeding 10%. Cal. Civ. Code § 1916-3(a).

9 **E. Fifth Claim for Relief – Claim For Money Had and Received**

10 151. Plaintiffs incorporate paragraphs 1-113 as if fully stated here.

11 152. This claim is brought on behalf of Plaintiffs and the Class against all
12 Defendants.

13 153. Defendant NSI is indebted to Plaintiffs and the Class members.

14 154. Defendant NSI received money belonging to Plaintiffs and the Class
15 that should have been used for their benefit by reducing the outstanding principal
16 on their loans.

17 155. The money was not used for the benefit of Plaintiffs or the Class.

18 156. The money was instead used by Defendant to pay interest that was
19 charged at a usurious rate.

20 157. Defendant has not returned any money to Plaintiffs or the Class, nor
21 has Defendant applied the money to principal for the benefit of the Plaintiffs or the
22 Class.

23 158. As a matter of equity and good conscience, the money should be
24 returned to Plaintiffs and the Class or be used for their benefit by applying it to the
25 payment of the principal of their respective loans.
26
27
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1 **F. Sixth Claim For Relief - Conversion**

2 159. Plaintiffs incorporates paragraphs 1-113 as if fully stated here.

3 160. This claim is brought on behalf of Plaintiffs and the Class against
4 Defendant NSI.

5 161. Defendant NSI wrongfully took, and misappropriated, payments of
6 interest that had been charged at a rate exceeding 10% from Plaintiffs and the Class.

7 162. Plaintiffs and Class members were the proper owners of the interest
8 payments wrongfully taken by Defendant at the time of the taking.

9 163. Plaintiffs and Class members were damaged as a result of the wrongful
10 taking of the interest charged at a rate exceeding 10%. The specific sums in which
11 Plaintiffs and Class members were damaged are capable of identification using
12 Defendant NSI's own records, kept in the ordinary course of doing business.

13
14 **VIII. PRAYER**

15 WHEREFORE, Plaintiffs, on behalf of themselves and the Class, request an
16 award and relief as follows:

17 **A.** An order certifying that this action is properly brought and may be
18 maintained as a class action, that Plaintiffs be appointed Class Representatives for
19 the Class, and that Plaintiffs' counsel be appointed Class Counsel.

20 **B.** Restitution in an amount to be determined.

21 **C.** An order refunding all interest paid that was charged at a rate
22 exceeding 10%, or directing that it be applied to principal.

23 **D.** An order cancelling all interest that was charged at a rate exceeding
24 10% that was not paid, including interest that was charged at a rate exceeding 10%
25 that was capitalized, and interest charged on that capitalized interest.

26 **E.** An order awarding three times the interest paid by Plaintiffs and Class
27 members within one year of filing suit, and thereafter, which was charged at a
28

1 usurious rate or, alternatively, three times the amount of interest paid on Private
2 Loans exceeding the 10% legal limit.

3 F. Damages as permitted under California law.

4 G. An order enjoining interest being charged at a rate exceeding 10% on
5 Plaintiffs' and Class members' Private Loans.

6 H. An order awarding Plaintiffs' their costs of suit, including reasonable
7 attorneys' fees and pre- and post-judgment interest.

8 I. Such other and further relief as may be deemed necessary or
9 appropriate.

10
11 **IX. DEMAND FOR JURY TRIAL**

12 Plaintiffs hereby demand a trial by jury on all claims and/or issues so triable.

13
14 DATED: March 1, 2016

By: /s/ William J. Genego